

STATE OF MICHIGAN  
COURT OF APPEALS

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BILLIE J. DERRY,

Plaintiff-Appellant,

v

JAMES A. DERRY,

Defendant-Appellee.

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UNPUBLISHED

August 31, 2010

No. 294029; 294167

Wayne Circuit Court

Family Division

LC No. 03-318588-DM

Before: JANSEN, P.J., and CAVANAGH and TALBOT, JJ.

PER CURIAM.

Billie J. Derry challenges the trial court's denial of her request to change the domicile of her minor child to a location out of Michigan. Because the trial court's factual findings were against the great weight of the evidence and the denial of the mother's motion for change of domicile comprised an abuse of discretion,<sup>1</sup> we vacate the trial court's ruling and remand this matter to an alternative judge to conduct further proceedings in the lower court.

When the custody of a child is governed by court order, a parent cannot change the legal residence of that child to a location that is more than 100 miles away without court approval.<sup>2</sup> A court may permit change of a child's legal residence if it is deemed warranted by a preponderance of the evidence after a review of the following factors:

- (a) Whether the legal residence change has the capacity to improve the quality of life for both the child and the locating parent.
- (b) The degree to which each parent has complied with, and utilized his or her time under, a court order governing parenting time with the child, and whether the parent's plan to change the child's legal residence is inspired by that parent's desire to defeat or frustrate the parenting time schedule.

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<sup>1</sup> *Spires v Bergman*, 276 Mich App 432, 436; 741 NW2d 523 (2007).

<sup>2</sup> MCL 722.31(1).

(c) The degree to which the court is satisfied that, if the court permits the legal residence change, it is possible to order a modification of the parenting time schedule and other arrangements governing the child's schedule in a manner that can provide an adequate basis for preserving and fostering the parental relationship between the child and each parent; and whether each parent is likely to comply with the modification.

(d) The extent to which the parent opposing the legal residence change is motivated by a desire to secure a financial advantage with respect to a support obligation.

(e) Domestic violence, regardless of whether the violence was directed against or witnessed by the child.<sup>3</sup>

Regarding factor (a), the trial court concluded that although the residence change would substantially improve the minor child's life from a financial standpoint<sup>4</sup>, it opined that the child's overall quality of life would not improve. It appears that this determination was based primarily on the involvement of the paternal extended family and the minor child's friends in his life in Michigan. Evaluating factor (b), the trial court opined that the mother's request for a domicile change was not made with an improper intent but that the child's father had exercised his parenting time to a significant extent and that any omissions or failure to utilize his parenting time was not based on complacency or lack of interest. Addressing the ability to preserve the father's relationship with the minor child in accordance with factor (c), the trial court found that relocation would substantially impair the father-son relationship, despite the mother's extensive proposed parenting time schedule. In this instance, the trial court found factors (d) and (e) to be inapplicable.

We disagree with the trial court's findings and find them lacking. While both parents share physical and legal custody of this child, the mother is the primary custodian. The child resides with her throughout the week. She is the one primarily responsible for housing, clothing and caring for the child. She oversees his getting to school and homework completion. She is primarily responsible for his medical appointments and participation in extracurricular activities. The father is a weekend parent. Descriptions of his interactions with the child during parenting time appear to revolve primarily around video gaming. Even though he is entitled to Thursday parenting time overnight into Friday, he has routinely elected to not exercise this opportunity. While the father indicates it is out of concern for the child and his school routine we suspect it to be more of a convenience to this parent. Given the loss of his driver's license due to three consecutive alcohol-related driving convictions within the previous ten year period it is unlikely the child's father is capable of transporting the child to school, even though it is a relatively

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<sup>3</sup> MCL 722.31(4); *Brown v Loveman*, 260 Mich App 576, 600; 680 NW2d 432 (2004).

<sup>4</sup> "It is well established that the relocating parent's increased earning potential may improve a child's quality of life[.]" *Rittershaus v Rittershaus*, 273 Mich App 462, 466; 730 NW2d 262 (2007).

minimal distance, without the assistance of his family members. The father acknowledges that the child never brings homework with him when it is the father's parenting time and that he does not routinely take the child for scheduled appointments or educational and extracurricular activities. While the father may attend some of these events such participation is merely passive, as it requires no assumption of responsibility.

Other than weekend room and board, there was no evidence presented that the child's father provides for him financially. The father indicated a yearly income of approximately \$24,000, with some additional income through rental properties, and admits to receiving financial assistance from his family. At the time of the court hearing, he was \$12,000 in arrears in the payment of child support. The child's stepfather provides medical insurance for the child and there was unrebutted testimony that the child's father failed to contribute to various medical and dental expenses incurred for the child. Despite these facts, the trial court determined a custodial environment was established with the father but never even addressed or acknowledged the existence of a custodial environment with the mother.

Examining the evidence pertaining to factor (a), there is no question that the change in residence "has the capacity" to improve the quality of life for this child and the mother. Mother is re-married. Her new husband has accepted a job promotion, which has resulted in an annual salary of \$145,000, in addition to the potential to earn a yearly bonus equal to 30 percent of his income and stock options, along with additional benefits. Mother and stepfather planned to purchase a significantly larger home situated in a community in a school district that is the equivalent or better than the child's current school district, which is based on the mother's residence and not the father's home. Necessary supplemental education services are available as are a variety of extracurricular activities for the child's potential participation. Although the mother will need to qualify in the new state of residence to obtain a professional license, she will have the opportunity to resume part-time employment. While not addressed by the trial court, the capacity of this move to improve the mother's life is unquestioned.<sup>5</sup> The trial court acknowledged the financial benefits of the move for the minor child and their potential to improve his quality of life. But the trial court, incorrectly, determined that removal of the child from his paternal extended family and various friends outweighed the recognized financial benefits and was too detrimental to justify the relocation.

As previously recognized by this Court:

Although defendant's family . . . play an important role in this child's life, the role of the extended family cannot be the determining factor in denying a change of domicile. Instead, the trial court must consider whether the move has the capacity to improve the quality of life for *both* the custodial parent and the child and whether there will be a realistic opportunity to preserve and foster the parental relationship with the noncustodial parent.<sup>6</sup>

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<sup>5</sup> MCL 722.31(4)(a).

<sup>6</sup> *Phillips v Jordan*, 241 Mich App 17, 31; 614 NW2d 183 (2000) (emphasis added).

While friends are also important to any child, they are not a determining factor in whether to grant a change of domicile and, as with extended family, cannot be of such significance to preclude a change of residence. The trial court appears to have completely ignored that the mother is the primary custodian for this child and has been for the past five years. To restrict his relocation could separate him from the very person who has served as his daily caretaker. It also would separate him from his stepfather with whom he reportedly has a good relationship and his older sibling. These relationships trump extended family, who has not served in any significant caretaker capacity for this child.

We also find the trial court erred in its analysis of factor (b) as the child's father has clearly not fully exercised his parenting time. He routinely declines Thursday nights into Friday mornings. While the father has the potential to have the child for 158 overnights a year, his own attorney acknowledged that he uses only 108 to 109 overnights. In other words, he declines to use over 30 percent of his scheduled time. There was no evidence to suggest that this limited use of parenting time stemmed from anything other than the father's failure to exercise these opportunities and was not attributable to any interference or preclusion by the child's mother.

The trial court also misinterpreted the statutory requirements regarding the potential to modify or develop a parenting schedule that would "provide an adequate basis for preserving and fostering the parental relationship."<sup>7</sup> The child's mother proposed a very generous parenting time schedule, which would provide the father with most holidays and a long weekend every month in addition to a majority of the child's summer vacation time after the conclusion of the school year. This did not include the potential for the father and child to communicate routinely by telephone, computer and remote video gaming or any other means available. The trial court wrongly found that such a schedule was insufficient and "would substantially impair defendant's parenting time" despite its recognition that the schedule proposed by the child's mother was "extensive." As with any relocation, it would be a practical impossibility to retain the existing parenting schedule. Contrary to the implication of the trial court, "the new visitation plan need not be equal to the prior visitation plan in all respects. It only need provide a realistic opportunity to preserve and foster the parental relationship previously enjoyed by the noncustodial parent."<sup>8</sup> The mother's proposed parenting schedule actually has the potential to improve the parent-child relationship in that it would provide an opportunity for the father to have extended time with the child during holidays and school vacations rather than simply retaining his status as a weekend dad with limited parenting responsibilities.

We find troubling other aspects of the trial court's evaluation and decision. One of the concerns pertains to the fact that the trial court interviewed the minor child, yet made no reference to how this interview may have influenced its decision. While referring to the possibility of the elder sibling testifying at the hearing, the trial court indicated "I just think it's inappropriate to call the parties' children and put them in the middle of something like this." While we concur that you do not want to place a child in a situation that would require him or

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<sup>7</sup> MCL 722.31(4)(c).

<sup>8</sup> *Mogle v Scriver*, 241 Mich App 192, 204; 614 NW2d 696 (2000).

her to choose a parent in the courtroom or demean a parent through questioning by counsel, in this instance, the child involved was 15 years of age and it was unrebutted that he wished to move out of state with his mother. We find it troubling that the trial court appears to have conducted an in camera interview with the child yet fails to disclose or acknowledge how this interview impacted its decision, even in the most general of terms. The child involved in this proceeding was certainly of sufficient age to have input into such a decision, but his preferences, while not determinative, appear to have been completely ignored or discounted.

The length of time expended to conduct and conclude these proceedings and the impact it has had on the minor child presents another concern. When this matter originated, the minor child was anticipating entering high school, which presented the perfect opportunity to effectuate such a move from the perspective of this being a natural change or progression in his life. Yet the trial court took almost nine months from the filing of the motion for change of domicile in November 2008 to the provision of its opinion in July 2009. Such a delay is difficult to justify, as it left the minor child and the parents in limbo, unable to plan or anticipate their futures.

While convinced that the trial court erred in its refusal of grant the mother's request for a change of domicile, a determination of how to proceed at this juncture is difficult because we do not know the status of the child and the parents regarding their current living arrangements and are reluctant to inflict any further potential damage to these individuals. The only reasonable option is to vacate the trial court's ruling, and remand this matter, with assignment to a different trial judge, for a new hearing on the motion to change domicile based on the currently existing factual circumstances.

Vacated and remanded, with assignment to an alternative trial judge. We do not retain jurisdiction.

/s/ Mark J. Cavanagh

/s/ Michael J. Talbot